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Nos. 79-1738 and 80-945

In the Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON, PETITIONER

v.

A. ERNEST FITZGERALD

BRYCE N. HARLOW AND ALEXANDER P. BUTTERFIELD, PETITIONERS

v.

A. ERNEST FITZGERALD

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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Prior to the filing of petitioners' briefs in these cases, the United States gave careful consideration to filing an amicus curiae brief supporting petitioners' claim of absolute immunity from civil damages liability. We concluded, however, that the government's recent submission in *Kissinger* v. *Halperin*, No. 79-880 (June 22, 1981), fully explicated the reasons justifying an absolute presidential and derivative

immunity from damages suits, and that formal amicus participation in these cases therefore was not necessary. Nonetheless, we wish now to reassert, particularly in view of the amicus curiae brief filed by seven members of Congress attacking the concept of presidential immunity, the United States' continuing commitment to, and interest in, the position advanced in our *Kissinger* submission, which the Court has on file, and to which we invite the Court's attention.[1]

The petitioners' brief in *Kissinger* (at 17-44) demonstrates that "[a]s the head of the Executive Branch of the federal government, the President, like the constitutional officers of the Legislative and Judicial Branches, must be free both of the fear of personal liability and of undue interference by coordinate parts of the government" (at 18). In addition, the *Kissinger* brief (at 44-50) explains that White House assistants are indispensable to the modern presidency and that the activities of these aides may also be cloaked with absolute immunity.

In sum, the United States continues to believe that the separation of powers and public policy considerations advanced in the petitioners' brief in *Kissinger* are correct.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1981

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[1]We are sending a copy of our *Kissinger* brief to the parties to these cases.

DOJ-1981-11